



COMDTINST M5800.1

JUNE 1 2005

COMMANDANT INSTRUCTION M5800.1

Subj: COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM

- Ref:
- (a) Uniform Code of Military Justice
 - (b) Manual for Courts-Martial, 2002
 - (c) Personnel Manual, COMDTINST M1000.6 (series)
 - (d) Military Justice Manual, COMDTINST M5810.1 (series)
 - (e) Standards of Ethical Conduct, COMDTINST M5370.8 (series)
 - (f) Standards of Conduct; 5 CFR Part 2635

1. **PURPOSE.** This Manual provides guidance for maintaining and regulating the professional responsibility of all lawyers and staff within the Coast Guard who are assigned to military legal billets and to civilian lawyer, paralegal and legal support positions or those otherwise authorized to practice law. It establishes the Coast Guard Legal Rules of Professional Conduct (CGLRPC) as well as specifies procedures for receiving, processing and taking action concerning complaints of professional misconduct made against lawyers.
2. **ACTION.** Under the supervision of the Commandant and recognizing the authority of the General Counsel as the principal legal officer of the Department of Homeland Security (DHS), The Judge Advocate General (TJAG) of the Coast Guard manages and supervises the practice of law within the Coast Guard. TJAG has the authority and responsibility to administer military justice, including the supervision of judges and lawyers presiding at or practicing before Courts Martial. Commanding officers of units with assigned legal officers or legal staff shall ensure compliance with the provisions of this Manual. Staff Judge Advocates and supervisors shall insure training in the CGLRPC is provided all assigned lawyers and staff subject to them. All Coast Guard lawyers are responsible for knowing and complying with the CGLRPC and the applicable rules and standards of professional conduct and ethics training and professional responsibility requirements of their licensing jurisdictions. Internet release authorized.

DISTRIBUTION – SDL No.143

	a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y	z
A	2	2	2	2	2	2	1		1	1		1	1	1	1	1	1		1		1					
B		5	10		1	1	1	2					2	1								1				
C											2															
D				1	1																					
E																		1								
F																										
G																										
H																										

NON-STANDARD DISTRIBUTION:

3. **DIRECTIVES AFFECTED.** This Manual does not supplement the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR Part 2635, or Standards of Ethical Conduct, COMDTINST M5370.8 (series). Those references and any supplemental regulations issued by the Department of Homeland Security guide the conduct of employees and members in the first instance. This Manual is to be used in conjunction with policies and procedures in Chapter 6 of the Military Justice Manual, COMDTINST M5810.1 (series). This Manual will control to the extent there is any conflict with the MJM.
4. **OBJECTIVES.** Coast Guard lawyers have a legal obligation to maintain the highest standards of professional and ethical conduct. Loyalty and fidelity to the United States, to the Coast Guard, to the law, and to clients (both institutional and individual) must always come before private gain or personal interest.
 - a. Many of a lawyer's professional responsibilities are guided by formal rules of professional responsibility and by other substantive and procedural laws and regulations. Coast Guard lawyers must also be guided by the Coast Guard's values and by their personal sense of conscience. Coast Guard lawyers should strive to attain the highest level of proficiency, to improve the law, and to exemplify the profession's and the Coast Guard's ideals of public service.
 - b. The nature of the practice of law is such that conflicting responsibilities can occur. Many ethical issues arise because of the conflicting demands of the law and legal system, a lawyer's responsibility to clients, and the lawyer's personal values. The CCLRPC are intended to provide guidance in resolving conflicts and the procedures prescribed in this Manual provide a mechanism to ensure accountability. They serve these major objectives:
 - (1) to provide workable guidance to Coast Guard judges, lawyers, and supporting personnel;
 - (2) to address the specific problems and requirements of the Coast Guard legal practice;
 - (3) to provide consistency with the rules of professional conduct promulgated by the American Bar Association, and establish a body of policy and precedent to which Coast Guard lawyers can reliably conform their conduct; and
 - (4) to provide rules of professional conduct that correspond closely to those governing lawyers of the Army, Marine Corps, Navy, and Air Force, with whom Coast Guard lawyers regularly serve, and, with respect to the Navy, to which Coast Guard lawyers may be transferred in accordance with 14 USC § 3.
 - c. In addition to performing Military Justice duties, military lawyers practice in all legal specialties alongside Coast Guard civilian lawyers. Coast Guard military lawyers and civilian lawyers may supervise, or be supervised by, the other. Uniform rules of professional responsibility, and procedures for reporting, investigation and disposition of allegations ensure the consistent delivery of legal service, guarantee equitable treatment of military and civilian lawyers, and promote confidence among Coast Guard commanders and decision-makers in the lawyers who

serve them. The prompt resolution of complaints of professional misconduct against Coast Guard lawyers is important to maintain the integrity of our legal advice.

5. **APPLICABILITY.**

- a. **Coast Guard legal personnel.** These rules and procedures apply to all lawyers employed by the Coast Guard, assigned to Coast Guard legal offices and staffs, or otherwise required to deliver legal services as a part of their duties (with the exception of Administrative Law Judges and their staffs), including judge advocates, military lawyers not designated as judge advocates, and civilian lawyers. A lawyer is an individual admitted to the practice of law by the highest court of a state or territory of the United States, or the District of Columbia, or otherwise authorized to practice law under the statutes and rules of a state or territory. This Manual applies to all other Coast Guard military and civilian personnel, who perform duty in a Coast Guard legal office or staff in support of Coast Guard lawyers.
- b. **Non-government lawyers.** These rules and procedures apply to lawyers who practice in Coast Guard proceedings governed by the Manual for Courts-Martial (MCM).
- c. **Reservists.** Reservists assigned to or performing legal duties face a special responsibility to ensure their private legal practice does not conflict with official duties. They must scrupulously avoid even the mere appearance of using their Coast Guard position for private gain or advantage. This Manual provides for a common understanding of these responsibilities and sets forth specific rules governing the legal practice of Coast Guard reserve lawyers.
- d. **Out-of-Specialty Judge Advocates.** Judge Advocates or other officers who are lawyers who are assigned to non-legal billets will not practice law on behalf of the Coast Guard or those entitled to Coast Guard legal services. These rules do not normally apply to the performance of these non-legal duties. To the extent an out-of-specialty judge advocate or other lawyer is authorized to perform legal duties (e.g. when authorized to provide legal assistance services in accordance with Legal Assistance Program, COMDTINST 5801.4 (series) or in a designated MSO "Suspension & Revocation" or other "hybrid" billet) these rules do apply. Because of the great potential for conflicts of interest, the rules for off-duty legal employment apply to all military lawyers and judge advocates regardless of assignment.

6. **RELATIONSHIP TO OTHER RULES OF PROFESSIONAL RESPONSIBILITY.** Although Coast Guard lawyers remain obligated to their licensing authorities, the CGLRPC govern Coast Guard legal practice.

- a. While these rules may preempt state rules in the event of a conflict, attorneys and managers should avoid such conflicts whenever possible. Accordingly, Coast Guard lawyers should generally follow the most restrictive rule that applies, whether it be the Coast Guard rule or a state rule. In the unlikely even that compliance with a more restrictive state rule has the potential to interfere with the effective performance of Coast Guard duties, the attorney should seek guidance from the chain of supervision and, if necessary, seek and advisory opinion under these rules.

- b. In the event the Coast Guard transfers to the U.S. Navy in accordance with 14 U.S.C. § 3 , these provisions will remain in effect, but the U.S. Navy Rules of Professional Conduct of Lawyers Practicing Under the Cognizance and Supervision of the Judge Advocate General [JAG INSTRUCTION 5803.1 (series)] will then control. Coast Guard lawyers detailed to other agencies that have rules of professional responsibility unique to them shall consult with LPD/e when they perceive a conflict with the CGLRPC. The CGLRPC do not apply to non-Coast Guard lawyers and judge advocates who may be serving with the Coast Guard.
 - c. Coast Guard lawyers assigned or detailed to the Department of Justice, performing duties as a Special Assistant U.S. Attorney, or otherwise representing the United States in the litigation of a criminal or civil case in a Federal court, acting under the direction of the Department of Justice, shall be bound by state rules of professional responsibility as provided for in 28 CFR Part 77, and otherwise follow these rules.
7. **COMMUNICATION AMONG COAST GUARD LAWYERS.** Article 6, UCMJ, prescribes that the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with TJAG, notwithstanding the chain of command. The ability to communicate between legal offices at higher and lower echelons of command will apply to all areas of practice. All Coast Guard lawyers are encouraged to communicate with one another in developing legal policies and positions, with due regard to the interests of the commands to which they are assigned. This communication ensures consistent and accurate legal support to the Coast Guard and avoids professional responsibility issues before they arise. Rule 1.13 provides additional guidance concerning advice in particular professional responsibility issues.
8. **OUTSIDE LEGAL EMPLOYMENT BY COAST GUARD LAWYERS.** Coast Guard military personnel on active duty are in 24-hour duty status and their military duties at all times take precedence on their time, talents, and attention. All Coast Guard lawyers are professionally responsible to the Coast Guard and are expected to devote their energies to their official duties without distraction. Moreover, off-duty legal employment may create actual or perceived conflicts of interest. Accordingly, Coast Guard lawyers may engage in outside legal employment only when consistent with this Manual and any regulations issued by the Department of Homeland Security supplementing 5 CFR Part 2635, and, with respect to judge advocates, the provisions of article 16.E of reference (b).
9. **VIOLATIONS.**
- a. Commanders, Staff Judge Advocates, and Legal Officers will notify TJAG of investigations of allegations of criminal misconduct involving Coast Guard lawyers, allegations of professional misconduct that violate the CGLRPC, and allegations of personal misconduct that otherwise cast doubt on the fitness of a lawyer to practice law, as provided for in this directive. Investigation of allegations will be undertaken at the lowest level of command pursuant to the procedures contained in this Manual.
 - b. Penalties for violation of the CGLRPC by Coast Guard lawyers include all administrative sanctions prescribed by law and regulation. Violations by non-government lawyers may result in

imposition of sanctions pursuant to RCM 109, MCM. A violation by a military lawyer would not, in itself, be a violation of Article 92(1), UCMJ, but the conduct itself may violate a punitive article of the Code, including Article 48. Nothing in this Manual precludes referral of violations to appropriate licensing authorities.

c. Nothing in this Manual shall limit the authority of:

- (1) TJAG to issue or withdraw any certification of qualification to act as military judge, any certification of competency to act as counsel before courts-martial, or any designation as judge advocate;
- (2) TJAG to suspend any lawyer from performing duties pending resolution of an allegation of professional misconduct or to prohibit permanently the performance of legal duties;
- (3) TJAG to refer violations to appropriate licensing authorities;
- (4) TJAG to refer violations to the General Counsel of the Department of Homeland Security, or for the General Counsel to request referral in an appropriate case; and
- (5) Commanding Officers to take appropriate disciplinary or administrative actions when warranted, unless TJAG otherwise directs in a case involving a violation of these rules.

10. **ADMINISTRATION.**

a. **TJAG Professional Responsibility Program Manager.** TJAG's Office Legal Policy & Program Development (G-LPDe) shall serve as the program manager for legal ethics and professional responsibility under the supervision of the Deputy Judge Advocate General. The professional responsibility program manager shall:

- (1) maintain the CGLRPC,
- (2) provide general guidance on matters of professional responsibility to all Coast Guard lawyers and will refer matters to TJAG's Panel on Legal Ethics & Professional Responsibility as appropriate,
- (3) serve as Executive Secretary for TJAG's Panel on Legal Ethics & Professional Responsibility,
- (4) receive, process, and monitor on behalf of TJAG complaints of professional violations of the CGLRPC, and
- (5) serve as liaison to the Judge Advocates General of the other military services, DHS various bar associations, etc. on matters pertaining to the development and implementation of ethics rules and guidelines for lawyers in the Coast Guard.

b. **Panel on Legal Ethics & Professional Responsibility.** The Panel serves as consultant to TJAG on matters relating to ethics and professional responsibility of CG lawyers and legal support staff. When requested by TJAG, the Deputy Judge Advocate General, or the Professional

Responsibility Program Manager, the Panel will recommend to TJAG interpretations of the CGLRPC or opinions concerning their application to particular ethical issues. The Panel may also provide an advisory opinion upon written request of a Coast Guard lawyer about the propriety of proposed actions under the rules of professional conduct, or the meaning of a particular rule. Membership on the Panel will consist of the following:

- (1) Chief, Office of Military Justice,
- (2) Chief, Office of General Law,
- (3) Chief, Office of Legal Policy & Program Development,
- (4) TJAG may appoint other Coast Guard or DHS lawyers (with the approval of the General Counsel of DHS) as necessary to provide required expertise in a specific area, to replace members unable to serve on a particular matter, to serve with respect to a particular matter or for a longer duration.

11. **NO RIGHT OF ACTION.** Nothing in this Manual creates a private right of action or legal duty, and no violation of the CGLRPC creates a private cause of action or presumption of a breach of a legal duty. Nothing in this paragraph prevents a Coast Guard lawyer from appealing an action taken under it against the lawyer to a forum having jurisdiction over the action, such as an appeal by a civilian lawyer to the Merit Systems Protection Board or a complaint to the Equal Employment Opportunity Commission.
12. **ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS.** Environmental considerations were examined in the development of this Manual and have been determined to be not applicable.
13. **FORMS/REPORTS.** Commandant (G-LPD/e) shall maintain records of complaints of allegations of professional misconduct in accordance with current Coast Guard directives regarding record correspondence. Copies of formal ethics advisory opinions shall be maintained and posted in the current legal counsel electronic document system.

John E. Crowley /s/
Judge Advocate General

- Encl: (1) Coast Guard Legal Rules of Professional Conduct
(2) Rules & Standards of Professional Conduct for CG Reserve Judge Advocates
(3) Procedures for Reporting Allegations of Professional Misconduct
(4) Off-duty Law Practice by Coast Guard Lawyers
(5) Guidelines for the Utilization of Legal Assistants & Paralegals
(6) Code of Judicial Conduct for Coast Guard Trial and Appellate Judges

Coast Guard Legal Professional Responsibility Program Coast Guard Legal Rules of Professional Conduct

Introduction

A Coast Guard lawyer is a representative of clients (both institutional and individual), an officer of the legal system, an officer of the Federal government, and a citizen who has a special responsibility to the quality of justice and the delivery of legal services to the Coast Guard [see Rule 1.13] and to individual clients [see Rule 1.13(e) and (f)]. A lawyer's conduct must at all times conform to the requirements of law, both in a professional service to clients and in the lawyer's personal affairs. A lawyer must demonstrate respect for the legal system and for those who serve it including judges, other lawyers and public officials.

The Coast Guard Legal Rules of Professional Conduct (CGLRPC), hereafter referred to as the Rules, guide Coast Guard lawyers in the application of their professional responsibility to clients and to the law. However, a lawyer also must be guided by a strong commitment to the Coast Guard's core values and their personal conscience. A lawyer must strive to attain the highest level of skill, to improve the law and the legal profession, to exemplify the profession's ideals of public service and to respect the truth-finding role of the courts.

Lawyers often encounter conflicting responsibilities in their profession. Most difficult ethical problems arise from conflicts between a lawyer's responsibilities to clients, to the law and legal system and to the lawyer's personal interest and conscience. The Rules are intended to prescribe guidance for resolving such conflicts. Yet, even within the framework of these Rules many difficult questions of professional discretion can arise. Such issues must be resolved through the exercise of professional and moral judgment guided by the basic principles underlying the rules.

These Rules are intended to govern the ethical conduct of Coast Guard lawyers. They should be used in conjunction with other laws and regulations that control the practice of lawyers, examples of which include the Uniform Code of Military Justice, the Rules for Courts Martial, Coast Guard regulations, and Department of Homeland Security (DHS) directives, in addition to the laws governing the practice of law in the state(s) in which the attorney is licensed.

The Rules are adapted directly from the American Bar Association's Model Rules of Professional Conduct, with contributions from corresponding Army, Air Force and Navy/Marine Corps rules and regulations (see Army Regulation 27-26, *Rules of Professional Conduct for Lawyers*; JAG Instruction 5803.1B, *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General*; TJAGD Standards 2, *Air Force Rules of Professional Conduct and Standards of Civility in Professional Conduct*). Changes to the ABA Model Rules have been made to reflect the unique nature of military legal practice generally and Coast Guard practice in particular. Changes are reflected in the

text. Some ABA rules have been omitted as inapplicable to our practice; others have been modified. The ABA Model Rules and the DOD rules are accompanied by considerable commentary that is not included here. Coast Guard lawyers should consult comments within those rules for guidance in applying them. In doing so, remember that these Rules have been adapted for Coast Guard applicability and not all commentary will be relevant or useful. The Judge Advocate General's Panel on Legal Ethics and Professional Responsibility will interpret these Rules under the supervision of the Judge Advocate General.

These Rules remain rules of reason and common sense. They will be interpreted in the context of the purposes of legal representation and the law. These rules cast as imperatives define proper conduct for purposes of professional discipline. Others may be termed "permissive" and permit personal discretion. No disciplinary action will be taken where the lawyer's action is within the bounds of discretion.

Some rules define the nature of the relationship between the lawyer and others and may be partly obligatory and disciplinary and partly descriptive.

In developing these Rules by adapting existing model rules and codes, an attempt has been made to balance the Coast Guard's needs with the position of Coast Guard lawyers as members of the larger legal profession. This balance is at times a difficult one that Coast Guard lawyers, unlike their private sector counterparts, must strive to maintain. A violation of these rules shall not create a private cause of action or a presumption of a breach of legal duty.

RULE 1

CLIENT-LAWYER RELATIONSHIPS

Rule 1.1 Competence

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) *[added]* Coast Guard military and civilian lawyers must at all times maintain membership "in good standing" with a licensing authority admitting the lawyer to the practice of law. Some states permit lawyers licensed in their jurisdiction to practice as a federal lawyer while in an inactive or analogous status and remain "in good standing." Other states do not consider inactive members to be "in good standing" and thus restrict their ability to practice law. Coast Guard lawyers may elect active or inactive status in their licensing jurisdiction so long as they are authorized to practice law as a federal government lawyer by that jurisdiction. Lawyers are expected to comply with the laws governing the practice of law in the state(s) in which the attorney is licensed, as well as with these rules.

(c) *[added]* Coast Guard military and civilian lawyers shall provide evidence of membership "in good standing" with the licensing authority admitting the lawyer to the practice of law when commencing employment and as may be required in other DHS directives or Coast Guard regulations. Such evidence of membership "in good standing" shall be provided to the Judge Advocate General (G-LPD) when requested.

Rule 1.2 Scope of Representation & Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.¹ In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

¹ But see COMDTINST M4200.19H, subchapter 3033.210-90, regarding contract dispute settlement authority.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 9.1(f), is required by these Rules;

(2) reasonably with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5 Fees

[omitted as inapplicable to government and/or Coast Guard practice.]

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (4) to prevent harm or significant impairment of national security or the readiness or capability of a military unit, aircraft or weapon system; or
- (5) to comply with other law or a court order.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict of Interest: Current Clients, Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation. *[remainder omitted as inapplicable to military practice]*

(f) *[omitted]*

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) *[omitted]*

(i) *[omitted]*

(j) *[omitted]*.

(k) *[omitted]*.

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10 Imputation of Conflict of Interest Rules

[changed] Coast Guard lawyers who work in the same legal office are not automatically disqualified from representing a client even if other Coast Guard lawyers in that office would be disqualified from doing so by Rule 1.7, 1.8, or 1.9.

Rule 1.11 Special Conflicts of Interest for Former & Current Government Officers and Employees

(a) *[omitted]*

(b) *[omitted]*

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) *[changed]* participate personally and substantially in a particular matter that, to his knowledge, will have direct and predictable effect on the financial interest of a prospective employer with whom he is seeking employment.²

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) *[changed]* A lawyer shall not participate personally and substantially in a particular matter that, to his knowledge, will have direct and predictable effect on the financial

² Disqualification is accomplished by not participating in the particular matter. Consideration should be given to documenting the disqualification and reporting the potential conflict to the lawyer's supervisor and to G-LPD/e. See 5 C.F.R. 2635.604 for additional information.

interest of a prospective employer with whom he is seeking employment.³

(c) *[omitted]*

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Rule 1.13 The United States and Coast Guard as Client

(a) *[changed]* Except when authorized to represent an individual client, a Coast Guard lawyer represents the United States and the Coast Guard in particular, acting through its authorized officials.

(b) *[changed]* If a Coast Guard lawyer knows that an officer, employee or other person associated with the Coast Guard is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the Coast Guard, or a violation of law which reasonably might be imputed to the Coast Guard, the lawyer shall proceed as is reasonably necessary in the best interest of the Coast Guard and the United States. The lawyer shall act similarly when the representation involves another Federal agency. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the agency concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the agency and the risk of revealing information relating to the representation to persons outside the agency. Such measures may include among others:

- (1) asking for reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority; and
- (3) referring the matter to higher authority, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the agency as determined by applicable law.

(c) *[changed]* If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act in the matter insists upon action, or a refusal to act, that is clearly a violation of law the lawyer may consult with senior Coast Guard lawyers in the same command or at higher levels of command, advise them of the lawyer's concerns,

³ Disqualification is accomplished by not participating in the particular matter. Consideration should be given to documenting the disqualification and reporting the potential conflict to the lawyer's supervisor and to G-LPD/e. See 5 C.F.R. 2635.604 for additional information.

and discuss available alternatives to avoid violation of law by the Coast Guard or the agency concerned and to prevent the lawyer from participating or assisting in any violation. In no event shall the Coast Guard lawyer participate in any illegal activity.

(d) *[changed]* In dealing with the Coast Guard's officials, members, employees, or other persons associated with the Coast Guard, a lawyer shall explain the Coast Guard is the lawyer's client when the lawyer knows or reasonably should know that the Coast Guard's interests are adverse to those of the persons with whom the lawyer is dealing.

(e) *[changed]* A lawyer representing the Coast Guard or another agency may also represent any of its officials, officers, employees, members, or other constituents, when otherwise authorized, subject to the provisions of Rule 1.7 and other applicable law and regulation. If the Coast Guard's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate Coast Guard official other than the individual who is to be represented.

(f) *[added]* A Coast Guard lawyer duly assigned to represent an individual who is subject to disciplinary or administrative action or who is a recipient of legal assistance services, has, for those purposes, a lawyer-client relationship with the individual.

Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.15 Safekeeping Property

[changed] A Coast Guard lawyer may hold the property of individual clients only when doing so is necessary to further the representation of the client. When it is necessary to hold a client's property, the lawyer must exercise the care of a fiduciary. Such property must be clearly labeled or otherwise identified, held apart from the

lawyer's personal property or from government property, and counsel should exercise care to ensure the safety of the property. Property will be promptly returned as soon as it is no longer necessary to the representation. Nothing in this rule shall be construed as limiting the authority of trial or defense counsel to receive documents and other items in the course of their duties.

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) *[omitted]*
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer

may retain papers relating to the client to the extent permitted by other law.

Rule 1.17 Sale of Law Practice

[omitted as inapplicable to military practice]

Rule 1.18 Duties Toward a Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

RULE 2

COUNSELOR

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.2 [blank]

Rule 2.3 Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

RULE 3

ADVOCATE

Rule 3.1 Meritorious Claims & Contentions

[changed] A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the accused in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) *[changed]* seek to influence a judge, court or board member, prospective court or board member or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) *[changed]* communicate with a court or board member or prospective court or board member after discharge of the court or board if:

(1) the communication is prohibited by law or court order;

(2) the court or board member has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No Coast Guard lawyer associated with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

DISCUSSION

A Coast Guard lawyer must comply with any applicable laws, regulations and policies in making public statements of any kind. Reference to appropriate public affairs guidance may be necessary.

Rule 3.7 Lawyer as Witness

(a) [changed] A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8 Special Responsibilities of a Trial Counsel
[Prosecutor]

The trial counsel in a criminal case shall:

(a) [changed] recommend the convening authority withdraw any charge or specification not warranted by the evidence;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) [changed] not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to pretrial investigation under Article 32, UCMJ;

(d) make timely disclosure to the defense of all evidence or information known to the trial counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order of the tribunal;

(e) [changed] not call a lawyer as a witness in an Article 32 proceeding or other criminal proceeding to present evidence about a past or present client unless the trial counsel reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the trial counsel's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rule 3.9 Advocate in Nonadjudicative Proceeding

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Nonadjudicative proceedings include legislatures, municipal councils and executive and administrative agencies acting in a rulemaking or policy-making capacity.

RULE 4

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client, a Coast Guard lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 Communications with Persons Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3 Dealing with Unrepresented Persons

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

RULE 5

COAST GUARD LEGAL OFFICES

Rule 5.1 Responsibilities of Staff Judge Advocates, Legal Officers and Supervisory Lawyers

(a) *[changed]*. The Judge Advocate General of the Coast Guard shall make reasonable efforts to ensure that all Coast Guard lawyers conform to the Rules of Professional Conduct.

(b) Lawyers having supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to these Rules of Professional Conduct.

(c) *[added]* Supervisory lawyers will assist subordinate lawyers in harmonizing these Rules with the rules of the licensing state(s) of their subordinates to the extent practicable.

(d) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) *[changed]* the lawyer has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(e) *[added]* A supervisory Coast Guard lawyer is responsible for making appropriate efforts to ensure subordinate lawyers are properly trained and are competent to perform the duties to which assigned.

Rule 5.2 Responsibilities of Subordinate Lawyers

(a) A lawyer is bound by these rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

(c) *[added]* A lawyer does not violate these rules if that lawyer acts in accordance with a ruling from G-LPD/e.

(d) *[added]* In the unlikely event that compliance with a more restrictive state rule has the potential to interfere with the effective performance of Coast Guard duties, the attorney should seek guidance from the chain of supervision and, if necessary, seek an advisory opinion under these rules.

(e) *[added]* Coast Guard lawyers assigned or detailed to the Department of Justice, performing duties as a Special Assistant U.S. Attorney, or otherwise representing the

United States in the litigation of a criminal or civil case in a Federal court, acting under the direction of the Department of Justice, shall be bound by state rules of professional responsibility as provided for in 28 CFR Part 77, and otherwise follow these rules.

Rule 5.3 Responsibilities Regarding Non-lawyer Assistants

[changed] Coast Guard lawyers who supervise non-lawyer assistants directly or indirectly will comply with *Guidelines for Legal Assistants and Paralegals in the Coast Guard Legal Program*. With respect to a non-lawyer employed or retained by or assigned to legal duties with a lawyer:

(a) *[changed]* the senior Coast Guard lawyer in an office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4 Professional Independence of a Lawyer

[changed] Notwithstanding the status of a military lawyer as a commissioned officer, or a civilian lawyer's responsibilities to higher Coast Guard authorities, a Coast Guard lawyer detailed to represent an individual is expected to exercise unfettered loyalty to the individual client. The lawyer shall exercise professional independence during the course of the representation consistent with these Rules, and is ultimately responsible for acting in the best interests of the individual client.

Rule 5.5 Unauthorized Practice of Law

[changed] Except as authorized by law, regulation, or Coast Guard directive, a Coast Guard lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not licensed to practice law in the performance of any activity that constitutes the unauthorized practice of law.

Rule 5.6 Restrictions on Right to Practice

[omitted as not applicable to government and/or Coast Guard legal practice.]

Rule 5.7 Responsibilities Regarding Non-law Duties

[changed] A Coast Guard lawyer shall also be subject to these rules with respect to non-legal official duties performed while that lawyer is assigned to a legal billet or otherwise authorized to practice law for the Coast Guard. Coast Guard Judge Advocates serving out-of-specialty are still subject to these rules whenever they give legal advice or perform legal services.

RULE 6

PUBLIC SERVICE

Rule 6.1 Pro Bono Publico Service

[changed] Coast Guard lawyers may not render public interest legal service, unless an exception is granted in accordance with applicable directives and policies regarding off-duty employment and to the extent it is not inconsistent or in conflict with their primary duties.

DISCUSSION

Coast Guard military personnel on active duty are in 24-hour duty status, and their military duties at all times take precedence on their time, talents, and attention. All Coast Guard lawyers are professionally responsible to the Coast Guard and are expected to devote their energies to their official duties without distraction. Moreover, the outside practice of law may create actual or perceived conflicts of interest. Accordingly, TJAG prohibits the outside practice of law, including *pro bono* service except in compliance with rules about outside employment. Where an exception is granted, service may not conflict with the lawyer's official duties and time to required to accomplish official duties.

Rule 6.2 Accepting Appointments

[omitted]

Rule 6.3 Membership in Legal Service Organization

[changed] Provided such service is performed in the lawyer's private and personal capacity, a lawyer may serve as a director, officer or member of a legal services organization, apart from the Coast Guard, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Rule 6.4 Law Reform Activities Affecting Client Interests

[changed] Provided such service is performed in the lawyer's private and personal capacity, a lawyer may serve as a director, officer or member of an not-for-profit organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of the Coast Guard.

Rule 6.5 Nonprofit and Court-Annexed Limited Service Programs

[omitted as inapplicable to government and/or Coast Guard military practice]

RULE 7

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule 7.2 Advertising

[omitted as inapplicable to government and/or Coast Guard practice]

Rule 7.3 Direct Contact with Prospective Clients

[omitted as inapplicable to government and/or Coast Guard practice]

Rule 7.4 Communication of Fields of Practice

[omitted as inapplicable to government and/or Coast Guard practice]

Rule 7.5 Coast Guard Letterhead

[changed] A Coast Guard lawyer may not use official Coast Guard or other government letterhead or stationery when communicating in a purely private capacity. This does not prohibit a Legal Assistance Lawyer from using Coast Guard letterhead when doing so is in compliance with regulations governing the Coast Guard Legal Assistance program.

Rule 7.6 Political Contributions to Obtain Legal Engagements or Appointments by Judges

[omitted as inapplicable to government and/or Coast Guard practice]

RULE 8

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1 Bar Admission and Disciplinary Matters

[changed] An applicant for admission to the bar, or an applicant to appointment as a Coast Guard judge advocate or for a civilian lawyer position or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Rule 8.3 Reporting Professional Misconduct

(a) *[changed]* A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall report that alleged violation in accordance with procedures specified by the Judge Advocate General.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Rule 8.5 Jurisdiction

[changed] These rules and procedures apply to all military lawyers (whether or not designated as "judge advocates") and civilian lawyers employed by the Coast Guard, assigned to Coast Guard legal offices and staffs or otherwise required to deliver legal services as a part of their duties (with the exception of Administrative Law Judges and their staffs). They also apply to non-government lawyers who practice in Coast Guard proceedings governed by the Manual for Courts Martial (MCM). Reservist lawyers will adhere to the Standards of Professional Conduct for Coast Guard Reserve Judge Advocates and to these rules and procedures insofar as they are compatible. All other Coast Guard military and civilian personnel, who perform duty in a Coast Guard legal office or staff in support of Coast Guard lawyers, will comply with the Guidelines for Legal Assistants and Paralegals in the Coast Guard Legal Program and to these rules and procedures insofar as they are compatible.

RULE 9

DEFINITIONS; TITLE

Rule 9.1 Definitions.

The following definitions are applicable to the Rules:

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(c) “Coast Guard lawyer” refers to a judge advocate, other military lawyer assigned to or performing legal duties, or a civilian lawyer employed by the Coast Guard who is assigned to or performing legal duties.

(d) “Coast Guard regulations” refer to Commandant Instructions and Coast Guard Regulations (see COMDTINST M5000.3B).

(e) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(f) “Firm” or “law firm” denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. The term includes a partnership, including a limited liability partnership, a corporation, a limited liability company, or an association treated as a corporation, authorized by law to practice law for profit.

(g) “Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(h) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of, and reasonably available alternatives to, the proposed course of conduct.

(i) “Judge Advocate” is a commissioned officer and licensed lawyer who is designated by the Judge Advocate General of the Coast Guard as qualified to perform legal duties, whether or not serving in a legal billet. The term “judge advocate” is synonymous with “law specialist,” and shall be substituted where appropriate for that term.

(j) “Judge Advocate General.” The chief legal officer of the U.S. Coast Guard, designated by the Secretary of the Department of Homeland Security. When the Coast Guard is transferred to the Navy in accordance with 14 USC § 3, the Judge Advocate of Navy will exercise authority of TJAG and the chief legal officer of the Coast Guard will exercise the authority of Chief Counsel of the Coast Guard.

(k) “Military Lawyer.” Military lawyer includes those individuals who have been admitted to the practice of law

in a state or territory of the United States and have been designated judge advocates, and those not previously designated judge advocates, who are, or have been, assigned to a Coast Guard legal office or otherwise required to deliver legal services as part of their duties.

(l) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(m) “Lawyer” means an individual admitted to the practice of law by the highest court of a state or territory of the United States, or the District of Columbia, or otherwise authorized to practice law under the statutes and rules of a state or territory.

(n) “Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

(o) “Person” includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(p) “Qualified legal assistance organization” means a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member’s freedom as a client to challenge the approved counsel or to select outside counsel at the clients expense, and is not in violation of any applicable law.

(q) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(r) “Reasonable belief” or “reasonably believes” when used in relation to conduct by a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) “State” includes the District of Columbia, Puerto Rico, and federal territories or possessions.

(u) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(v) “Tribunal” includes a court or other adjudicatory body.

Rule 9.2 Title

These rules will be known and cited as the Coast Guard Legal Rules of Professional Conduct (CGLRPC).

Coast Guard Legal Professional Responsibility Program Standards of Professional Conduct for Coast Guard Reserve Judge Advocates

Introduction

Government service is a public trust that requires placing loyalty to country, ethical principles, and the law above private gain and other interests. Practices that may be accepted in the private sector are not necessarily acceptable for reserve judge advocates when assigned to or performing legal duties. These standards augment the Coast Guard Legal Rules of Professional Conduct (CGLRPC) and proscribe conduct that may arise in circumstances that reserve judge advocates may encounter.

RULE 1

REPRESENTATION ADVERSE TO THE COAST GUARD

Rule 1.1. A reserve judge advocate in his or her civilian capacity shall not represent a client in a matter adverse to the Coast Guard unless the Commandant (G-L) first consents in writing.

Discussion. The principle underlying this rule is that the Coast Guard is a reserve judge advocate's client (see CGLRPC 1.13). The rule ensures that the Coast Guard will be accorded the same protections that state rules of professional responsibility generally afford all clients. The rule also emphasizes the high ethical obligations of lawyers to protect the interests of the Coast Guard. It is based on *ABA Model Rules of Professional Conduct* Rule 1.7, which bars representation of a client that is adverse to another client unless each client consents. The rule does not establish a new definition of conflict of interest; rather, it identifies an area of potential conflicts and establishes a mechanism to avoid them.

Consent will be granted unless the proposed representation would create a conflict of interest with respect to Coast Guard duties actually performed by the reserve judge advocate. Notwithstanding this rule, the legal officer/staff judge advocate (SJA) may not grant consent where a statutory bar to representation has been imposed. See, e.g., 18 USC § 207.

Compliance with the consent procedures under this rule does not relieve the reserve judge advocate of his or her obligation to obtain the consent of the other client. See Part D for consent procedures.

Examples.

(1) A reserve judge advocate attached for training to district X is asked to serve as civilian counsel by a military member in a court-martial in district X. The reserve judge advocate must obtain the consent of the district legal officer/SJA. Consent will normally

be granted by the SJA unless an actual conflict of interest is present. Coast Guard interests are served by allowing military members to be represented by counsel of their choice. The same result obtains with respect to representation in administrative proceedings.

(2) A reserve judge advocate attached for training to district X and retained as counsel in a tort action arising at district Y is required by this rule to obtain the consent of the district legal officer/SJA at district X. Consent will be granted unless an actual conflict of interest is present.

Rule 1.2.

(1) Where a reserve judge advocate seeks consent under Rule 1, he or she shall apply in writing, setting forth all relevant facts that are not privileged or protected from disclosure by law or by an ethical standard that is binding upon the reserve judge advocate. Consent may be requested and obtained orally in exigent circumstances when the relevant facts are clear and obtaining prior written consent is not practicable. In such cases, the reserve judge advocate shall apply for consent in writing within 5 working days. A request for consent shall be directed to the Legal Officer/SJA of the office of assignment or attachment for training.

(2) Legal Officers/SJAs are delegated the authority to grant consent on behalf of the Coast Guard. Consent will be granted or denied within three working days of receipt of the request.

(3) If consent is denied, the reserve judge advocate may request reconsideration by TJAG. The SJA at each lower level will expedite communication of requests for reconsideration by all available means, including the use of e-mail.

(4) SJAs will establish and maintain a permanent file for requests and their corresponding consent or denial. One copy of each consent or denial will be provided to the reserve judge advocate, and an information copy of

each request and the corresponding consent or denial shall be forwarded G-LPD/e.

(5) Renewable consents for not longer than one year may be granted as to a class of matters.

(6) Consent authority may be exercised by Legal Officers/SJAs to establish working arrangements with reserve judge advocates that protect the Coast Guard's interests while avoiding unnecessary restrictions upon reserve judge advocates' civilian activities. Tailored consent arrangements can take into account the relationship between a reserve judge advocate's military duties and the matter(s) for which consent is sought. Consideration may also be given to the structure and physical layout of the Legal Officers/SJA's organization, the missions of organizations which are provided legal services, the sensitivity of the matters involved, the specifics of the relationship of the reserve judge advocate to his or her firm, and the degree to which the reserve judge advocate has in the past cooperated in matters of proper conduct and ethics. When a class consent is involved, consideration may be given to the frequency with which matters within the class arise, the precision with which the class is described, and the impact of denial of class consent on the affected reserve judge advocate's private practice.

RULE 2

PRIOR PARTICIPATION IN A MATTER ON BEHALF OF THE COAST GUARD

Rule. Except as law may otherwise expressly permit, a reserve judge advocate acting in his or her civilian capacity shall not represent a client in connection with a matter in which the reserve judge advocate participated personally and substantially on behalf of the Coast Guard. If a firm with which the reserve judge advocate is associated undertakes or continues representation after his or her disqualification under this rule, the reserve judge advocate shall:

- a. Advise the firm that its continued representation may constitute a violation of the Ethics in Government Act (18 USC § 207(c));
- b. Advise the firm of the possible applicability of *ABA Model Rules of Professional Conduct* Rule 1.11; and
- c. Give prompt written notice to the Coast Guard, through the SJA, of the firm's participation in the matter, with sufficient information regarding the reserve judge advocate's role to enable the Coast Guard to ascertain compliance with this rule.

Discussion. This rule is intended to avoid conflicts of interest between the reserve judge advocate's military and civilian positions where he or she previously represented the Coast Guard. Because the restriction applies only to those areas in which the reserve judge advocate participated "personally and substantially," it recognizes the disqualification rule of 18 USC § 207(g), which prohibits

representation by "partners" of a special government employee. The term "personally and substantially" has the same meaning under this rule as it has under the statute.

RULE 3

PRIOR PARTICIPATION IN A MATTER ON BEHALF OF A PRIVATE CLIENT

Rule. A reserve judge advocate shall not, in the performance of his or her official duties or while in duty status, participate in a matter in which he or she participated personally and substantially in his or her civilian capacity.

RULE 4

USE OF NONPUBLIC GOVERNMENT INFORMATION IN REPRESENTATION

Rule. A reserve judge advocate, having acquired information through his or her association with the Coast Guard which could not have been known to the reserve judge advocate but for that association, shall not, in his or her civilian capacity, represent a client in a matter in which the information so acquired could be used to the material disadvantage of the Coast Guard or its employees, officers, contractors, or agents; nor shall he or she reveal such information to anyone other than representatives of the government.

Discussion. Regardless of whether an lawyer-client relationship exists between a reserve judge advocate and the Coast Guard, every reserve judge advocate is provided access to information to which he or she could not otherwise have had access. This information may take many forms, including knowledge of specific facts, the existence of documents, the identity of personnel with specific knowledge, negotiation strategies or tactics, or views, opinions, or risk assessments of key Coast Guard personnel with respect to the particular case involved. Reserve judge advocates representing clients in matters where such information can be used adversely to the interests of the Coast Guard have conflicting interests. A prohibition against the use of such information would not be sufficient to eliminate the conflict or to protect Coast Guard interests. Accordingly, it is necessary to require reserve judge advocates to refrain from any representation of the nature proscribed. Revealing such information is also prohibited.

RULE 5

ADVERTISING

Rule. A reserve judge advocate shall not advertise his or her affiliation as a reserve judge advocate or attachment to a particular active or reserve unit, staff or installation.

Discussion. The reserve judge advocate has the Coast Guard as his or her client and therefore must not trade on his or her status as a judge advocate. The reserve judge advocate must avoid advertising his or her active affiliation with Coast Guard Legal Program because doing so might give the appearance that the reserve judge advocate is using his or her public office for private gain. Such an appearance would undermine public confidence in the integrity and professionalism of the Coast Guard Legal Program. In addition, the reserve judge advocate's special relationship with the Coast Guard Legal Program is such that to allow that status to be carried in advertising could create an impression of favoritism by, or influence with, the Coast Guard. There also exists the potential that advertising such affiliation could lead to the impression that the Coast Guard endorses or otherwise sponsors the reserve judge advocate in his or her private business.

Consistent with the Standards of Conduct for government employees (5 CFR Part 2635), this rule does not prohibit the inclusion of reserve military grade and service component (e.g., "Lieutenant, USCGR") in advertising or on business cards or stationery. In addition, the rule does not prohibit a simple statement of reserve affiliation with the Coast Guard Legal Program in biographical material, such as a resume, professional directory, or law firm home page on the Internet.

RULE 6

PRIVATE BUSINESS ACTIVITIES DURING DUTY HOURS

Rule. A reserve judge advocate shall not, while in active or inactive duty status, conduct private business during duty hours.

Discussion. It is expected that office chiefs, legal officers and SJAs will administer this rule reasonably and that a *de minimis* exception will be appropriately applied. The rule is not intended to preclude an occasional brief telephone call concerning appointments or the docketing of cases; nor is it intended to preclude the conduct of private business during off-duty hours. It is intended to preclude such activities as interviewing clients, conducting legal research, and drafting briefs during duty hours.

RULE 7

REPRESENTATION OF THE SAME CLIENT IN BOTH JUDGE ADVOCATE AND PRIVATE CAPACITIES

Rule. A reserve judge advocate shall not, for compensation, represent any individual, partnership, or

corporation in connection with a matter where the initial contact with the individual with respect to such matter was as a judge advocate.

Discussion. This rule is intended to preclude a reserve judge advocate from taking inappropriate advantage of his or her position. It bars representation when the initial contact occurred while the reserve judge advocate was acting in an official capacity, such as in providing legal assistance pursuant to Legal Assistance Program COMDTINST 5801.4 (series), or in investigating a claim. It is not intended to restrict representation so long as the initial contact was not made pursuant to the performance of the reserve judge advocate's official duties.

A reserve judge advocate may be asked to represent, in a private capacity, a member of the unit or organization to which the reserve judge advocate is assigned or attached. Such representation is not prohibited by this rule. However, before undertaking representation, the reserve judge advocate should consider all of the surrounding facts and circumstances.

A reserve judge advocate should use good judgment to avoid situations where the private representation of a member of the unit or organization may cause others in the unit or organization to perceive that the member will receive favorable treatment with respect to official matters. A reserve judge advocate should also avoid private representations that may preclude the effective discharge of his or her official duties, such as advising a commander on official matters affecting the member with whom there is a private lawyer-client relationship.

Examples.

(1) A reserve judge advocate performing legal assistance interviews a client requesting a will. If the client, because of the size and/or complexity of his or her estate, requires more complex estate planning than can be provided by the legal office, the reserve judge advocate may not solicit the client's business for himself or herself or his or her firm in this matter. Furthermore, neither the reserve judge advocate nor the firm may accept this individual as a fee-paying client in this matter.

(2) Under the same set of facts as above, the same client later contacts the reserve judge advocate in his or her civilian capacity on an unrelated matter, such as the defense of a traffic violation. The reserve judge advocate may accept this client, but only with respect to the unrelated matter (i.e., the traffic violation). Disclosure to the district legal officer/SJA and discussion of potential problems is encouraged in all cases in which a client has previously been seen by the reserve judge advocate while serving as a judge advocate.

(3) A reserve judge advocate performing legal assistance interviews a client regarding an adoption. Completing the adoption process may be beyond the scope of legal assistance. The reserve judge advocate may, however, in his or her civilian capacity, represent the client in this matter without fee. It is permissible for the client to pay court and other processing costs.

(4) While on duty, a reserve judge advocate is contacted by a military member concerning a private matter not covered by the legal assistance program. The reserve judge advocate may accept this client provided the initial contact with respect to the matter did not occur while the reserve judge advocate was: (a) providing legal assistance pursuant to Legal Assistance Program COMDTINST 5801.4(series), or (b) responsible for taking official action on the matter for which representation is sought.

RULE 8

SOLICITATION OF CLIENTS

Rule. A reserve judge advocate shall not solicit clients for himself or herself or his or her firm while in duty status or while in uniform; nor shall a reserve judge advocate solicit clients on military installations (other than through advertising permitted under Rule 5).

Discussion. This rule is intended to preclude a reserve judge advocate from trading upon his or her status. It does not prohibit representation where the client initiated the request for legal services. As used in this rule, the term "client" includes "customer" as that term relates to a judge advocate's business.

RULE 9

DEFINITIONS; TITLE

Rule 9.1 Definitions.

(1) The definitions contained in Rule 9.1, CGLRPC, apply to these Standards.

(2) These Standards apply to reserve "judge advocates" because reservists assigned to or who perform legal duties have been judge advocates. To ensure complete coverage, however, "judge advocates" include all military lawyers (as defined in Rule 9.1(k)) for purposes of these Standards.

Rule 9.2 Title

These Standards shall be known and cited as "Standards of Professional Conduct for Coast Guard Reserve Judge Advocates."

Coast Guard Legal Professional Responsibility Program Procedures for Reporting and Resolving Allegations of Professional Misconduct

1. Policy.

Coast Guard commanders and decision-makers must have the utmost confidence in the integrity and professional ethical standards of their lawyers. Prompt inquiry into and disposition of reports of alleged professional ethical misconduct by Coast Guard lawyers and legal staff are important to maintain the integrity of the Coast Guard's legal program. Reports of professional misconduct will be resolved expeditiously and fairly.

- a. Subject to the limitations of Article 37, UCMJ, information as to alleged professional misconduct by Coast Guard lawyers and other legal office staff (e.g. paralegals, legal technicians, etc.) that violates the CGLRPC should be reported, together with appropriate supporting information, to TJAG.
- b. Commanders, Staff Judge Advocates, Legal Officers, and other supervisory attorneys will notify TJAG of investigations of allegations of criminal misconduct involving Coast Guard lawyers.
- c. These procedures are promulgated consistent with RCM 109 and are intended to provide supplementary detail to the process set out in that rule. They are equally applicable to reports of alleged lawyer misconduct throughout Coast Guard legal practice and are not limited to military justice and court martial proceedings. No reporting requirement in this Instruction supersedes any other reporting requirements imposed by DHS directives or Coast Guard regulations.
- d. Acts or omissions by Coast Guard lawyers may constitute professional misconduct, criminal misconduct, poor performance of duty, or a combination of these three. Care must be taken to properly characterize the nature of the conduct to determine where the reporting, investigatory and disposition authority properly lies.
- e. TJAG determines questions of professional misconduct by Coast Guard lawyers within the Coast Guard. This includes but is not limited to incompetence to perform legal duties, failure to act diligently and promptly in representation, and unfitness as a lawyer. Criminal misconduct is properly addressed through the disciplinary process provided in the UCMJ and Coast Guard Military Justice Manual or through referral to appropriate civilian authorities, but TJAG has an interest when a Coast Guard lawyer commits criminal or other personal misconduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other

respects. Poor performance is generally dealt with by the chain of command through a variety of administrative and corrective actions. This includes, for example, documentation in officer evaluation reports and civilian evaluations.

- f. Inquiries and investigations into allegations of professional misconduct will normally be deferred until any related criminal or other investigation or proceeding is complete. However, a pending criminal or other investigation or proceeding does not bar the initiation of completion of a professional misconduct investigation and does not bar TJAG from imposing professional disciplinary sanctions as provided for in this directive.

2. Definitions.

- a. See CGLRPC, Rule 9.1.
- b. Supervisory Lawyer: The following are designated "supervisory lawyers" for the purposes of receiving complaints of alleged misconduct:
 - (1) Judge Advocate General Office & Staff Chiefs,
 - (2) Area Staff Judge Advocates (MLC Legal Division Chiefs),
 - (3) District Staff Judge Advocates (Legal Officers),
 - (4) USCGA Staff Judge Advocate (Legal Officer), and
 - (5) NPFC Legal Division Chief.
- c. Misconduct. For the purpose of these procedures, professional misconduct is defined by Rule 8.4 of the CGLRPC.

3. Investigation and Discipline of Coast Guard Lawyers.

- a. Reporting alleged misconduct by lawyers.
 - (1) Complaints. A complaint may be made by any person and should be in writing, signed by the person making the complaint. Complaints should contain a complete, factual statement of the acts or omissions making up the substance of the allegation of professional misconduct.

(2) Where to Submit & Action upon Receipt.

(a) Reports alleging professional misconduct by Coast Guard lawyers shall be forwarded to the supervisory lawyer for the subject's chain of command. If the subject of the allegation is not in the chain of command of a supervisory lawyer (as defined in these procedures), the complaint shall be forwarded to TJAG. If the report of alleged misconduct involves a supervisory lawyer, the report should be made to TJAG. All allegations of professional misconduct against military judges shall be made to TJAG.

(b) Upon receiving information of a possible violation of the rules of professional conduct, a supervisory lawyer shall notify TJAG Professional Responsibility Program Manager (G-LPD/e) that a potential allegation exists. G-LPD/e will monitor the processing and disposition of the matter and provide procedural guidance.

(c) The supervisory lawyer shall review the allegation and make one of the following initial determinations:

1. No further action warranted. If upon initial review of misconduct, the supervisory lawyer determines that no further action is warranted, the supervisory lawyer shall advise G-LPD/e and shall close the case. G-LPD/e may require a report concerning the matter and recommend to TJAG that further inquiry be made in accordance with the procedures outlined below.

2. Further inquiry required. If upon initial review of the report of misconduct, the supervisory lawyer determines that further action is warranted, the supervisory lawyer will convene an initial inquiry. Inquiries will be conducted in accordance with the procedures outlined below. Inquires conducted pursuant to RCM 109 must be ordered by TJAG.
- (3) Deferral. An inquiry into allegations of professional misconduct may be deferred when the allegation also involves potential criminal misconduct. Inquires may also be deferred when otherwise warranted. Supervisory lawyers will notify G-LPD/e when inquiries are deferred.
- (4) Delegation of Authority to Conduct an Inquiry. Consistent with TJAG's authority and responsibility to maintain ethical standards for all Coast Guard lawyers

regardless of where assigned, TJAG is authorized to conduct inquiries into allegations of professional misconduct. In matters not arising under RCM 109, the authority to conduct inquiries concerning Coast Guard lawyers is delegated to the supervisory lawyers defined above.

- (5) Suspension from Performing Legal Duties Pending Investigation. TJAG may temporarily suspend any Coast Guard lawyer from performing legal duties pending further inquiry or investigation.

b. Procedures for Conducting the Initial Inquiry.

- (1) General. The initial inquiry shall follow the procedures for a one-officer standard informal administrative investigation [see, Administrative Investigations Manual [AIM], COMDTINST M5830.1 (series)] to the extent practical. All matters associated with the investigation shall be administratively confidential. Investigations shall be conducted with reasonable promptness.

- (2) Initial Inquiry Officer. The initial inquiry officer should meet the qualifications of RCM 109(c)(5)(B). The initial inquiry officer should be senior to the respondent and of similar legal experience (*i.e.* an officer senior to the respondent with current or prior military trial judge experience should be assigned if reasonably available to conduct an inquiry into allegations against a current military trial judge) [*but see*, Article 66(g), UCMJ limitation on appointment of a current sitting appellate judge to investigate another appellate judge]. TJAG may authorize the appointment of a civilian lawyer to serve as initial inquiry officer as an exception to COMDTINST M5830.1.

- (3) Report. The initial inquiry officer's written report shall render an opinion as to whether a complaint has been substantiated. A complaint is substantiated upon finding that it is shown by a preponderance of the evidence (*i.e.*, more likely than not) that the respondent engaged in the alleged acts or omissions constituting professional misconduct or demonstrating unfitness to perform legal duties. The initial inquiry officer shall make recommendations for appropriate action in their report.

- (4) Due Process.

(a) Notice. The initial inquiry officer will notify the subject of the complaint that a professional responsibility inquiry under this section is being conducted, the specific nature of the complaint, and the date by which written material in response to the

complaint may be submitted. The notice shall advise the respondent of the rights set out in this subparagraph. Failure to submit a written response waives the opportunity to be heard.

(b) Opportunity to be heard. If the subject chooses to appear before or respond to the initial inquiry officer, the subject shall have the right to:

1. be provided with the allegations and a summary of all relevant facts collected by the initial inquiry officer and to offer written rebuttal to any of that information.
 2. present, in writing, relevant facts, statements, explanations, documents, and physical evidence to the initial inquiry officer; and,
 3. submit a written argument on his or her behalf.
- (5) Confidentiality. Complaints of professional misconduct must be treated with confidentiality. This protects the subject of the complaint when an allegation is not substantiated. Confidentiality also encourages the reporting of allegations and permits complaints to be screened with the full cooperation of others, but confidentiality shall not bar release to the subject of the underlying facts of a complaint or initial inquiry in accordance with subparagraph 3.b(4).

c. Action Following the Initial Inquiry

- (1) Additional Inquiry. The supervisory lawyer who initiated the inquiry may order additional inquiry.
- (2) Complaint Not Substantiated. If a supervisory lawyer other than TJAG determines a complaint against a Coast Guard lawyer is not substantiated, the supervisory lawyer will forward the inquiry with their recommendation to TJAG. If TJAG agrees with this recommendation, the complainant and respondent shall be notified that no further action will be taken and the case will be closed.
- (3) Complaint Substantiated. If a supervisory lawyer other than TJAG determines a complaint against a Coast Guard lawyer is substantiated, the supervisory lawyer will forward the inquiry with recommendation to TJAG.

d. TJAG Action.

- (1) In response to a substantiated complaint against a Coast Guard lawyer, TJAG may dismiss the complaint, take professional disciplinary action based on the existing record and/or refer the matter to the appropriate state licensing authority, or order the Ethics Commission [see subparagraph 3.e below] to consider the complaint and render an opinion and recommendation.
- (2) Prior to taking any action other than to dismiss the complaint, TJAG shall ensure the respondent was afforded the rights set out in subparagraph 3b(4). Prior to taking professional disciplinary action, TJAG shall find in writing that respondent engaged in professional misconduct or is otherwise unfit, and that misconduct or unfitness is established by a preponderance of the evidence. TJAG shall find clear and convincing evidence of misconduct or unfitness prior to taking professional disciplinary action against a military trial judge or an appellate military judge, for misconduct or unfitness in connection with judicial duties.
- (3) Professional disciplinary actions that may be taken against military or civilian lawyers include:
 - (a) counseling or a direction to supervising officers to counsel;
 - (b) oral or written (non-punitive) censure;
 - (c) temporary, indefinite, or permanent suspension from practice in courts-martial or assignment as a military trial or appellate judge;
 - (d) revocation of Article 26(b) and 27(b), UCMJ certifications, as to judge advocates; and/or
 - (e) temporary, indefinite, or permanent suspension from performance of other legal duties in the Coast Guard.

e. Ethics Commission

- (1) Membership. The Ethics Commission should normally consist of the Deputy JAG and two Judge Advocate General Office Chiefs selected by TJAG. When practicable, military members of the Ethics Commission should be senior to the subject of the complaint and of similar legal experience [*but see*, Article 66(g), UCMJ limitation on appointment of a current sitting appellate judge to investigate another appellate judge]. An initial inquiry officer may not be

appointed to an Ethics Commission in the same case.

- (2) Duties. Generally, the Ethics Commission considers a complaint and associated initial inquiry report and provides an opinion whether the respondent's acts or omissions constitute professional misconduct or demonstrate unfitness to perform legal duties. If ordered to conduct additional inquiry into the complaint, the Commission shall generally follow the procedures for a standard informal administrative board of investigation as contained in the Administrative Investigations Manual, COMDTINST M5830.1 (series). The Ethics Commission may rely on the evidence provided to it or may augment the record as it deems appropriate. Before making any finding or recommendation regarding the alleged misconduct or unfitness, the Ethics Commission shall ensure the subject of the complaint was provided a complete copy of all information the Ethics Commission will consider in making a finding or recommendation. The Ethics Commission shall provide written findings and opinions concerning the alleged misconduct or unfitness. Dissenting opinions, if any, shall be included in providing a report to TJAG. The Ethics Commission shall identify those applicable provisions of the CGLRPC, Code of Judicial Conduct, MCM, or other standard of conduct drawn into question, and state whether, under the circumstances, the applicable standards were violated, with supporting rationale. If misconduct or unfitness to perform duties is found, the Ethics Commission shall recommend an appropriate disposition.
 - (3) TJAG Action. Upon receipt of the Commission's report TJAG may order additional inquiry, return the matter to the Ethics Commission for additional consideration by the same or different members, or take one of the actions TJAG could have taken upon receipt of the substantiated complaint in the first instance.
- f. Professional Disqualification. Notwithstanding the provisions of this section, TJAG may order temporary, indefinite, or permanent suspension from practice in courts-martial or assignment as a military trial or appellate judge; revocation of Article 26(b) and 27(b), UCMJ certifications; and/or temporary, indefinite, or permanent suspension from performance of other legal duties in the Coast Guard, if a Coast Guard lawyer becomes professionally disqualified from practice through due process of law, such as imposition of suspension or disbarment by a State licensing authority or a Federal court, or upon suspension or disqualification by the Judge Advocate General of another armed service.
- g. Contempt Proceedings. Professional disciplinary actions are separate and distinct from any matter involving contempt, as provided by RCM 809, except to the extent that the same conduct may be relevant to both proceedings.
- h. Reporting Cases to Licensing Authorities. If TJAG determines that the CGLRPC or other applicable standards have been violated and the seriousness of the violation warrants, TJAG may direct the matter be reported to the appropriate licensing authorities of the subject lawyer. Only TJAG may make or order such a report in the name of the Coast Guard.
- (1) The formal finding of professional misconduct may trigger a separate requirement on the part of the subject lawyer to report the action to his or her licensing authorities. It is the responsibility of the lawyer to know and comply with any such requirement.
 - (2) Coast Guard lawyers who are obliged by the rules of their state licensing authority to report misconduct to the licensing authority of the lawyer alleged to have committed misconduct may do so where notification according to this directive is insufficient to meet the obligation. However, a reporting lawyer should state clearly that the report is made in an individual capacity and not on behalf of TJAG or Coast Guard. The use of Coast Guard letterhead or email is not authorized for such reports.

Coast Guard Legal Professional Responsibility Program Off-Duty Legal Employment

1. Policy.

Coast Guard military personnel on active duty are in 24-hour duty status and their military duties at all times take precedence on their time, talents, and attention. All Coast Guard lawyers are professionally responsible to the Coast Guard and are expected to devote their energies to their official duties without distraction. Moreover, the outside practice of law may create actual or perceived conflicts of interest. Accordingly, TJAG prohibits off-duty legal employment, except in compliance with this Instruction. All Coast Guard lawyers are also bound by any regulations issued by the Department of Homeland Security supplementing 5 CFR Part 2635, and judge advocates are bound as well by the provisions of article 16.E of the CG Personnel Manual, COMDTINST M1000.6 (series).

2. Definitions.

a. See CGLRPC, Rule 9.1.

b. **Off-duty Legal Employment:** Off-duty legal employment is defined as any regular provision of legal advice, counsel, assistance or representation, with or without compensation, that is not performed pursuant or incident to official duties as a Coast Guard lawyer, and outside the normal tour of duty. *This includes such employment while in a terminal leave status.* Excluded from this definition are the following (unless otherwise limited by law or regulation, such as the limitations mentioned in paragraph 3 below):

- (1) Occasional uncompensated legal advice and assistance, not amounting to representation in proceedings or correspondence, that is rendered to relatives, friends, or community or similar organizations with which the lawyer is associated;
- (2) The practice of law on the employee's own behalf, or on behalf of parents, spouse, or children; or
- (3) Teaching law as part of a program of education or training, or legal writing for educational purposes or for publication.

c. **Supervisory Lawyer:** The following are designated "supervisory lawyers" for the purposes of approving requests for off-duty legal employment:

- (1) Deputy JAG
- (2) Judge Advocate General Office & Staff Chiefs

(3) Area Staff Judge Advocates (MLC Legal Division Chiefs)

(4) District Staff Judge Advocates (Legal Officers)

(5) USCGA Staff Judge Advocate (Legal Officer)

(6) NPFC Legal Division Chief

3. **Limitations.** Coast Guard officers and employees are prohibited by law from receiving pay or allowances from any source other than the United States for the performance of any official service or duty unless authorized by law. Furthermore, 18 USC §§ 203 and 205 prohibit federal officers and employees from personally representing or receiving, directly or indirectly, compensation for representing any other person before any Federal agency or court on matters in which the United States is a party or has an interest. These limitations are particularly significant to Coast Guard lawyers who intend to engage concurrently in civilian law practice. In these situations, the potential is high for actual or apparent conflict arising from the mere opportunity to obtain clients through contacts in the course of official business. Unique conflicts or adverse appearances may develop because of a Coast Guard lawyer's special ethical responsibilities and loyalties.

4. Prohibitions.

a. A Coast Guard lawyer may not engage in compensated off-duty legal employment on behalf of any person who is eligible for legal assistance (as defined in COMDTINST 5801.4(series)), without specific authorization from TJAG. This prohibition is based on the very high likelihood of the appearance of misuse of government office for private gain that arises in the legal assistance context. The prohibition is based on the status of the potential client and applies whether or not the services are actually available in a military legal assistance office.

b. As a general rule, approval will not be granted for off-duty legal employment by Coast Guard lawyers to practice law part-time in association with lawyers or law firms that represent clients with interests adverse to the Coast Guard or Department.

4. **No Endorsement.** The approval to engage in off-duty legal employment does not in any way certify the qualifications or competencies of the Coast Guard lawyer to engage in that practice. Furthermore, because outside law practice is necessarily beyond the scope of the Coast Guard lawyer's official duties, consideration should be given to obtain personal malpractice insurance coverage.

5. **Approval.**

a. Coast Guard lawyers who desire to engage in off-duty legal employment, must comply with the notification requirements contained in paragraph 16.E.2 of the Personnel Manual. In addition, they must obtain approval from their supervisory lawyer (as defined in this Instruction). For those Coast Guard lawyers who are not in the chain of command of a supervisory lawyer as defined above, approval will be requested (via the chain of command) from the Deputy JAG.

b. The supervisory lawyer will review the request for compliance with applicable law and regulation and for any actual or apparent conflicts of interest. Based on this review, the supervisory lawyer will approve or disapprove the request.

- (1) Approvals to engage in off-duty legal employment will be made in writing setting forth any limitations or conditions in the employment.
- (2) Disapprovals will also be made in writing citing the reasons for not approving the request.
- (3) Copies of all actions will be forwarded to the TJAG Professional Responsibility Program Manager (G-LPD/e).

5. **Content of Request.** Requests for approval of off-duty legal employment will be made in writing via memo or email (as directed by the approving lawyer). Requests will contain the following information:

a. Lawyer Information

- (1) Name, rank/grade.
- (2) Current assignment and position (including any watch-standing duties).
- (3) Brief description of duties and responsibilities.

b. Off-Duty Legal Employment Information.

- (1) Identify the type of legal organization with which you will be affiliated (i.e. sole practitioner, law firm, public interest organization, etc.).
- (2) Address, phone number of organization.
- (3) Identify physical work location.
- (4) Proposed working hours.
- (5) Proposed hours/month.
- (6) Description of law practice.
- (7) Identify desired start/end dates of off-duty legal employment.

c. Representation Information.

(1) Describe any anticipated representation (of yourself or other lawyers in the organization) of any client before the United States or in any matter in which the United States has an interest.

(2) Identify whether the clientele of the legal organization with which you will be affiliated are military personnel or their dependents.

(3) Describe any federal government related work which your proposed practice will engage in, including, but not limited to courts-martial, admin board representation, claims against the government, etc.

(4) Describe the manner in which you will be compensated.

d. Include the following statement in your request:

I certify that I have read and understand my obligation under enclosure (4) to Commandant Instruction 5803.1(series) as well as my obligations under the Coast Guard Personnel Manual, COMDTINST M1000.6 (series), the Standards of Conduct regulations, COMDTINST M5370.8 (series) and the Coast Guard Legal Rules of Professional Conduct. I certify that to the best of my knowledge, no apparent or actual conflicts of interest or professional improprieties are presented in my proposed off-duty legal employment. I also certify that if any conflicts of interest may become apparent, I will report the circumstance to my supervisory lawyer immediately.

Coast Guard Legal Professional Responsibility Program

Guidelines for Legal Assistants and Paralegals in the Coast Guard Legal Program

Introduction

Coast Guard lawyers have an ethical duty to make legal services available to their clients, whether their client is the government or an individual. Except where prohibited by law, in furtherance of this obligation, Coast Guard lawyers may utilize legal assistants.

GUIDELINE 1

QUALIFICATION

Guideline 1.1. Any Coast Guard lawyer utilizing a legal assistant shall first ascertain that such person is qualified to act in that capacity either by reason of special training, experience, and/or designation by the Judge Advocate General.

Guideline 1.2. A Coast Guard lawyer may rely on the assurance of a supervisory attorney concerning the qualifications of a legal assistant.

agency unless expressly permitted by statute, court rule or decision, administrative rule or regulation, or by the rules relating to discipline of lawyers or these guidelines.

Discussion: Generally, a legal assistant cannot appear, plead, try cases or argue in court on behalf of another person or do anything in a representative capacity for a client; only a duly licensed lawyer may perform these functions unless expressly permitted by statute, court or administrative regulation. The provisions regarding the signing of documents or pleadings do not prohibit a legal assistant from signing as a witness or notary public or in some other non-representative capacity. This provision is directed solely to the signing of documents as a representative of a client.

GUIDELINE 2

PRACTICE OF LAW

Guideline 2.1. A legal assistant is not permitted to give legal advice or to engage in the practice of law except as provided in these Guidelines.

Discussion: While legal assistants may have a certain level of knowledge and training they do not possess the expertise of someone who is qualified and licensed as a lawyer. Therefore, legal assistants shall not provide legal advice on their own to Coast Guard organizational or individual clients or otherwise engage in the practice of law.

Guideline 2.2. For the purpose of these Guidelines, a legal assistant is not practicing law when a legal assistant is acting under the ultimate direction and supervision of a lawyer and the legal assistant is applying knowledge of law and legal procedure, short of providing legal advice, on behalf of and with the knowledge of the lawyer.

Guideline 3.2. A lawyer, particularly in the area of legal assistance, may permit a legal assistant to perform services in representation of a client, where not otherwise prohibited, provided:

- a. The client is fully informed and understands that the legal assistant is not a lawyer;
- b. The lawyer remains fully responsible and accountable for such representation, including all actions taken or not taken by the legal assistant;
- c. The lawyer maintains a direct relationship with the client;
- d. Persons with whom the legal assistant communicates are informed of the legal assistant's status; and
- e. The lawyer supervises the legal assistant's performance.

GUIDELINE 3

REPRESENTATION

Guideline 3.1. A legal assistant is not permitted to represent a client before any court or administrative agency requiring parties to be represented by counsel, nor shall a legal assistant sign any pleading, paper or document filed on behalf of a client with any court or

GUIDELINE 4

SUPERVISION

Guideline 4.1 Coast Guard lawyers shall exercise care to prevent a legal assistant from engaging in conduct which would involve the lawyer in a violation of the Coast Guard Legal Rules of Professional Conduct (CGLRPC).

Guideline 4.2. The lawyer is ultimately responsible for work performed by a legal assistant on behalf of a client at the direction or under the supervision of the lawyer. The lawyer shall be accountable for the work performed by the legal assistant in accordance with the CGLRPC.

Guideline 4.3. Coast Guard Staff Judge Advocates and Legal Officers whose offices use legal assistants shall make certain that legal assistants are familiar with these Guidelines, the CGLRPC, and this Instruction.

Discussion: Coast Guard lawyers bear responsibility to instruct and supervise a legal assistant so the legal assistant will not cause the lawyer to violate the CGLRPC. The legal assistant must be made aware of the provisions of the CGLRPC and its guidelines, and should be instructed to avoid conduct that would be unethical or reflect adversely on the lawyer and the Coast Guard.

GUIDELINE 5

DISCLOSURE

Guideline 5.1. The legal assistant will disclose at the beginning of any professional contact on behalf of a lawyer or the legal office, whether or not the contact is with a client or is connected with representation of a client, that the legal assistant is not a lawyer, particularly in the area of legal assistance. Lawyers shall instruct legal assistants to make such disclosure.

Discussion: Disclosure must be made by the legal assistant to clients and others outside of the Coast Guard legal office to avoid any misunderstanding as to the role of the legal assistant. If a legal assistant becomes aware that another person believes the legal assistant is a lawyer, the legal assistant must make it clear that this is not the case. In all communication, voice or written, the lawyer should insure that the non-lawyer status of the legal assistant is disclosed in dealings with persons outside the office. This does not apply in obvious matters of routine office administration that do not involve the legal work of the lawyer or the office.

Guideline 5.2. Legal assistants who are certified paralegals (either civilian or Yeoman with L-5 competency code) may use Coast Guard business cards with their non-lawyer status designated.

Discussion: Legal assistants who have successfully completed an accredited paralegal assistant program resulting in either Professional Certification or an undergraduate degree, may have Coast Guard business cards designed to identify the legal assistant as such and state to which Coast Guard legal office they are assigned.

Guideline 5.3. Legal assistants who have successfully completed an accredited paralegal assistant program resulting in either professional certification or an undergraduate degree, may sign correspondence on

Coast Guard legal office letterhead, provided the legal assistant is otherwise authorized and signature is followed by an appropriate identifying designation of the legal assistant as a non-lawyer.

GUIDELINE 6

CONFLICT OF INTEREST

Guideline 6.1. A Coast Guard lawyer utilizing a legal assistant shall ensure that no personal, social, or business interest, association, or relationship of the legal assistant conflicts with the services rendered to the client.

Guideline 6.2. A legal assistant will inform the lawyer of any interest, association, or relationship that might constitute or cause a conflict, or give the appearance of constituting or causing such a conflict, with services rendered to the client.

Guideline 6.3. If a lawyer becomes aware that a legal assistant has a conflict of interest, the lawyer should exclude the legal assistant from participation in any services performed in connection with the matter or client.

Discussion: This guideline should be construed broadly. A lawyer who becomes aware of a conflict involving a legal assistant involved in a particular matter should disclose the conflict to the client. No interest or loyalty of the legal assistant may be permitted to interfere with the lawyer's independent exercise of professional judgment.

GUIDELINE 7

DEFINITIONS

Guideline 7.1. The definitions contained in Rule 9.1, CGLRPC, apply to these Standards.

Guideline 7.2. The term "legal assistant," as used in these guidelines has been adapted from the definition provided by the American Bar Association:

A Legal Assistant is a person, qualified through education, training or work experience, who is employed or retained by the Coast Guard in a capacity or function which involves the performance, under the ultimate direction and supervision of a lawyer, of specifically delegated substantive legal work¹, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the lawyer would perform the task.

¹ The work must be more than simply clerical or secretarial.

Guideline 9.2. The following are included within the designation of “legal assistant”:

- (a) Military personnel who have graduated from an accredited paralegal course, including qualified Coast Guard Paralegals (YN L-5 competency);
- (b) Military personnel who are qualified Coast Guard Legal Technicians (YN L-1 competency);
- (c) Military personnel who are qualified Coast Guard Court Reporters (YN L-3 competency);
- (d) Military personnel who have graduated from law school but are not yet admitted to the practice of law and are assigned to a billet performing legal duties.
- (e) Civilian employees of the Coast Guard in a GS “legal assistant” or “paralegal specialist” series position (or equivalent under DHS personnel rules).
- (f) Interns² and law students working in a Coast Guard legal office, including military personnel enrolled in law school full or part-time and civilian interns employed by the Coast Guard or performing volunteer services;
- (g) Any other military or civilian personnel, qualified through education, training or work experience, who has been designated by TJAG of the Coast Guard or fills a designated position as a “legal assistant” or “paralegal.”

² Lawyers admitted to the practice of law outside the United States and graduates of law school not yet admitted to the practice of law in any state or territory of the United States.

Coast Guard Legal Professional Responsibility Program Code of Judicial Conduct for Coast Guard Trial and Appellate Judges

Introduction

Our American legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code is the notion that Coast Guard judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in the military legal system.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of Coast Guard judges. While the American Bar Association's (ABA) Model Code of Judicial Conduct (August 1990) served as the basis for this Code, changes to the ABA Model Code were required to ensure that this Code met the unique needs of Coast Guard practice. This Code, Like the ABA Code, consists of broad statements called Canons, specific rules set forth in Sections under each canon, a Terminology Section, an Application Section, and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as advisory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, federal statutes and regulations, DHS (DHS) Directives, Coast Guard regulations, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions. Compliance with this Code does not relieve a judge from compliance with Joint Ethics Rules, DHS Directives, or Coast Guard regulations.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system. See e.g., Rule for Courts-Martial (hereafter RCM) 109. In addition, this Code and the Canons and Sections are not to be construed as a general order or regulation within the meaning of Article 92, Uniform Code of Military Justice (UCMJ), nor are they designed or intended as a basis for civil liability or criminal actions under the UCMJ. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding or by judges for their own personal benefit.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. Coast Guard Judges should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards that should govern the conduct of all Coast Guard judges and to provide guidance to assist them in establishing and maintaining high standards of judicial and personal conduct. This Code is of particular importance within a military justice system that, for historical and practical reasons, possesses characteristics not commonly found in civilian criminal justice systems.

Definitions

The definitions in Rule 9.1, CGLRPC, apply to this Code, except as otherwise provided here.

"Appropriate authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported.

"Coast Guard Judge" includes "judge," "military judge," "trial judge," and "appellate judge" and is intended to refer to Coast Guard military judges who are judge advocates serving on active duty temporarily or permanently, or who are civilian employees of the Coast Guard serving in that capacity.

"Coast Guard Regulations" refer to Commandant Instructions and to Coast Guard Regulations.

"Court personnel" does not include the lawyers in a proceeding before a judge.

"Economic interest" denotes ownership of a more than *de minimis* legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

"Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A

person's knowledge may be inferred from circumstances.

"Law" denotes court rules as well as statutes, constitutional provisions and decisional law, DHS Directives and Coast Guard regulations.

"Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

"Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

"Military magistrate" is a judge advocate empowered to direct the release of persons from pretrial confinement, or to recommend release from pretrial confinement pending final disposition of foreign criminal charges on a determination that continued confinement does not meet legal requirements, and to issue search and seizure authorizations upon finding probable cause. The term "military magistrate" also encompasses "part-time military magistrates."

"Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.

"Periodic part-time judge." A periodic part-time judge is a judge who serves or expects to serve repeatedly on a part-time basis but under a separate appointment for each limited period of service or for each matter.

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in a military society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the Coast Guard judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary:

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the democratic system of government under law.

Congress and the public expect the military to have a judicial system that is responsive to the unique needs of discipline in the armed services but safeguards the rights of members of the armed forces. To that end, Congress has created a military judiciary that is intended to be independent. Accordingly, judges must recognize and safeguard against any affront to the independence of a court, such as attempted unlawful influence by a commander or other superior, or invasion of the deliberative process.

Coast Guard trial and appellate judges must ensure that their conduct comports with, and is perceived to comport with, the principle of judicial independence and integrity. That principle includes maintaining the confidentiality of the deliberative process and the invocation, when necessary, of qualified judicial privilege. The judiciary's independence and integrity ultimately depend upon the personal and professional conduct of the individual judge.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code.

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Commentary:

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. As to the acceptance of awards, see Section 4D(4) and Commentary. A Coast Guard judge's conduct is further constrained by federal statutes and regulations, DHS Directives and Coast Guard regulations.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request. When preparing letters of recommendation, Coast Guard judges may use judicial letterhead stationary, may refer to their position and duties in the body of the letter, and may use their duty title in the signature block, so long as other conditions pertaining to the use of government letterhead are met.

Coast Guard judges may participate in the process of judicial selection by cooperating with appointing authorities seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.

A Coast Guard judge should not volunteer as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

Commentary:

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it

would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

Section 2C is not intended to preclude a judge from holding membership in private organizations which do not practice invidious discrimination. Organizations chartered, approved, or recognized by DHS or by the Coast Guard are presumed to be proper for membership.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials

and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. This Section 3B(5) does not preclude court findings or rulings in accordance with applicable law when race, sex, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider

other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if

the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Section 3B(7). In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3B(7) are clearly met, subject to RCM 802, as applicable. Unless an exception in Section 3B(7) applies, a judge must disclose to the parties any *ex parte* communications received.

A judge must not independently investigate facts in a case and must consider only the evidence presented. This provision does not preclude trial or appellate courts from taking judicial notice during consideration of a case. This provision also does not prevent a Coast Guard judge from calling for additional evidence to be presented during trial [see Article 46, UCMJ, and RCM 913 (c)(1)(F)], nor does it prevent the U.S. Coast Guard Court of Military Appeals from exercising its fact finding powers under Article 66(c), UCMJ, or considering extra-record matters as permitted by law.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

The judicial duties of some Coast Guard Judges are collateral to other duties. Judicial duties are, however, the most important duties assigned to a collateral-duty judge. While the needs of the Service may require a Coast Guard judge to attend first to non-judicial duties, a Judge must timely attend to judicial duties to ensure the orderly and expeditious administration of justice. A Judge whose other duties unduly delay or distract from judicial duties must bring those circumstances immediately to the attention of the Chief Trial Judge or the Chief Judge of the Court of Criminal Appeals, as appropriate.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. Coast Guard directives and regulations may further govern the conduct of judges, lawyers, and support personnel relating to trial publicity.

(10) A judge shall not commend or criticize court members for their findings or sentence other than in a court order or opinion in a proceeding, but may express appreciation to court members for their service to the judicial system and the community.

Commentary:

Commending or criticizing court members for their findings and/or sentence may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case, and could convey to the members that the convening authority or Coast Guard establishment approves or disapproves of their decision.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary:

Although Coast Guard judges ordinarily lack specific powers of appointment, this Canon prohibits Coast Guard judges from using their position as judges to exercise undue or improper influence on the civil service or military personnel system.

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Coast Guard Legal Rules of Professional Conduct (CGLRPC) should take appropriate action as required by the Rules. A judge having knowledge that a lawyer has committed a violation of the CGLRPC that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary:

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body. Coast Guard judges have a responsibility to ensure that the highest standards of justice and ethical responsibility are observed throughout the military justice system. Their responsibility includes taking appropriate action regarding conduct that raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The rule was designed to reflect the standards for reporting professional misconduct that appears in the CGLRPC, and Judges should follow the reporting procedures of the Rules.

E. Disqualification.

Coast Guard judges shall disqualify themselves in a proceeding when required by RCM 902 or other provision of law or regulation. Coast Guard appellate judges shall disqualify themselves from hearing a case for the same reasons that Coast Guard trial judges must disqualify themselves under RCM 902.

Commentary:

See RCM 902 for rules and procedures regarding disqualification of military judges. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. Appellate judges, however, are not subject to *voir dire* by counsel regarding potential grounds for challenge.

CANON 4

A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

Commentary:

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. In both actuality and appearance, Coast Guard judges must carefully follow the provisions of statutes, executive orders, and applicable DHS Directives and Coast Guard regulations prescribing rules to uphold the integrity and public confidence in military and federal public service.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Section 2C and accompanying Commentary.

B. Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code, applicable federal statutes and regulations, DHS Directives, and Coast Guard regulations.

Commentary:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities, to the extent that such expressions do not violate restrictions on speech imposed on military officers by virtue of their military status.

In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

C. Governmental, Civic or Charitable Activities.

(1) A Coast Guard judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice, or except when acting pro se in a matter involving the judge or the judge's interests or when permitted by applicable federal statutes and regulations, DHS Directives, and Coast Guard Regulations.

Commentary:

See Section 2B regarding the obligation to avoid improper influence.

As a military officer, a Coast Guard judge is subject to the obligations of military service, including orders that may require the judge to testify before a legislative or executive body, or serve on a board or commission. To the extent the judge may be consulted or have any choice in the matter, the judge should consider the purpose of Section 4C(1) – (3) and invite attention to any potential violation of this Code. In any event, the judge's superior appointing or detailing authority should consider the desirability or necessity for requiring any violation in light of the purpose of the Preamble and Canons 1 through 4 of this Code.

(2) A Coast Guard judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice unless the commission, committee, or position, is one normally associated with being a professional Coast Guard officer. A Coast Guard judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Commentary:

Section 4C(2) in the ABA Code of Judicial Conduct prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Section 4C(3). The appropriateness of Coast Guard judges accepting any governmental position except one relating to the law, legal system, or administration of justice as authorized by Section 4C(3). The appropriateness of Coast Guard judges accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary. As military officers, Coast Guard judges may serve as members of promotion and selection boards, subject to the limitations on Coast Guard appellate judges found in Article 66(g), UCMJ.

Section 4C(2) does not govern a judge's service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit.

(3) A Coast Guard judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the limitations in Section 4C(4) and the other requirements of this Code, applicable federal statutes and regulations, DHS Directives and Coast Guard regulations.

Commentary:

Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).

See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2C or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example, a judge is prohibited by Section 4G from serving as a legal advisor to a civic or charitable organization.

(4) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise of an organization listed in 4(C)(3):

(a) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory authority;

(b) may make recommendations to public and private fund-granting organizations on projects and programs

concerning the law a1., the legal system or the administration of justice;

(c) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(4), if the membership solicitation is essentially a fund-raising mechanism;

(d) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Commentary:

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: 1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority; 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves; and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(4) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise. In evaluating the application of this guidance, the judge should consult applicable federal statutes and regulations, DHS directives and Coast Guard regulations, which further govern the judge's conduct.

A judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code, applicable federal statutes and regulations, DHS directives and Coast Guard regulations.

D. Financial Activities.

(1) A Coast Guard judge shall not engage in financial and business dealings that

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

Commentary:

The Time for Compliance provision of this Code postpones the time for compliance with certain provisions of this Section in some cases.

When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase "subject to the requirements of this Code."

(2) A Coast Guard judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

Commentary:

This Section provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's

family, and investments owned jointly by the judge and members of the judge's family.

(3) A Coast Guard judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

(a) a business closely held by the judge or members of the judge's family, or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

Commentary:

Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties or if the judge's participation would involve misuse of the prestige of judicial office.

(4) A Coast Guard judge shall not accept or permit a member of the judge's family residing in the judge's household to accept, a gift, bequest, favor or loan from anyone except for:

Commentary:

Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

Commentary:

Acceptance of an invitation to a law-related function is governed by Section 4D(4)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(4)(h).

A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(1) and 2B. Federal statutes and regulations, DHS directives and Coast Guard regulations also control what gifts and favors a Coast Guard judge may legally accept. This Code does not supercede the rules under applicable federal statutes and regulations, DHS directives and Coast Guard regulations. See Section 4H.

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

Commentary:

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(4)(e).

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge.

Commentary:

Section 4D(4) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

E. Fiduciary Activities.

(1) A Coast Guard judge shall not serve as executor, administrator or other personal representative, trustee, guardian, lawyer in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Commentary:

The Time for Compliance provision of this Code postpones the time for compliance with certain provisions of this Section in some cases.

Section 4E applies to trial and appellate military judges only when a party or parties for whom the judge serves as executor, administrator, personal representative, or other fiduciary may appear in the judges' court.

F. Service as Arbitrator or Mediator. A Coast Guard judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

Commentary:

Section 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

G. Practice of Law. A Coast Guard judge shall not engage in the private practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

Commentary:

This prohibition refers to the practice of law in a representative capacity and not in a *pro se* capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2(B). Moreover, Coast Guard judges must comply with applicable regulatory guidance before engaging in any private law practice.

Coast Guard judges will ensure that they do not engage in any matter that interferes with, or is incompatible with, their duties. Coast Guard judges will not engage in any matter that, under the circumstances, may reasonably be expected to create the appearance of a conflict of interest or bring discredit on the Government, the DHS or the United States Coast Guard.

The prohibition against practicing law does not include teaching courses concerning the law if the judge does not violate applicable law or other prohibitions in this Code.

H. Standards of Conduct. A Coast Guard judge is bound by all applicable federal statutes and regulations, DHS directives, and Coast Guard regulations governing standards of conduct of military personnel.

Commentary:

Coast Guard judges are bound by federal statutes and regulations, DHS directives, and Coast Guard regulations governing their financial activities, to include the acceptance of gifts, bequests, honoraria, etc. See, e.g., "Standards of Ethical Conduct for Employees of the Executive Branch" (5CFR 2635) and the Department of Defense Joint Ethics Regulations. Where this Code conflicts with those statutes, directives, or regulations, the statutes, directives, and regulations govern. This Code provides general guidelines that should assist the military judge in determining the propriety of his or her activities even under the federal statutes and regulations, DHS directives, and Coast Guard regulations when those provisions may not be clear on a particular issue.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E, or as otherwise required by law or regulation.

Commentary:

Section 3 and R.C.M. 902 require a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic interest" as explained in the Terminology Section. Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties. A judge has the rights of any other citizen, including the right to privacy of

the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties and insure public confidence in the judiciary.

Trial and appellate military judges should be aware that not all private investments are free of ethical considerations. A pertinent example is the purchase of shares in a firm which has a contract with the Coast Guard or the DHS to perform drug testing.

CANON 5

A COAST GUARD JUDGE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

Commentary:

A Coast Guard judge must be sensitive to political activity that casts doubt on the judge's independence and ability to decide issues impartially. While this Code does not define inappropriate political activity, Coast Guard judges, as military officers, must be cognizant that their political activities are governed by applicable federal statutes and regulations, DHS directives and Coast Guard regulations.

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. All Coast Guard judges, as defined by this Code, shall comply with this Code when serving in a judicial assignment or performing judicial functions on active duty, except as provided below.

Commentary:

The intent of this Code is to cover only those individuals who have been certified as judges by The Judge Advocate General and are currently performing in a judicial assignment or performing judicial functions.

B. Retired Judge Subject to Recall. A retired Coast Guard judge subject to recall who by law is not permitted to practice law is not required to comply:

(1) except while serving as a judge, with Section 4F; and

(2) at any time with Section 4E.

Commentary:

This provision is meant to apply only to retired Coast Guard judges who may be prohibited by the laws of their state from practicing law.

C. Military magistrates. A military magistrate, who is not a full-time judge, shall comply with Canons 1 and 2, and with Section 3B, of this Code, when performing any function of a military magistrate as defined by Coast Guard regulations. A military magistrate, who is not a full-time judge, is not otherwise required to comply with this Code.

Commentary:

When performing their magistrate duties, military magistrates perform judicial functions. When performing their judicial roles, military magistrates need to be cognizant of the ethical responsibilities of a judge and comply with the standards expected of judges.

D. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

Commentary:

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse financial consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.